(13)

No. 91-913

In The
Supreme Court of the United States
October Term, 1991

JOHN R. PATTERSON, TRUSTEE,

Petitioner,

v.

JOSEPH B. SHUMATE, JR.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

MOTION FOR LEAVE TO FILE *AMICUS* BRIEF BY *AMICUS CURIAE,* ELDON S. REED AND BRIEF BY *AMICUS CURIAE,* ELDON S. REED IN SUPPORT OF RESPONDENT

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MOTION FOR LEAVE TO FILE *AMICUS* BRIEF BY *AMICUS CURIAE,* ELDON S. REED

Eldon S. Reed ("Reed") hereby requests this Court for leave to file the accompanying proposed *amicus* brief in support of Joseph B. Shumate, Jr., the Respondent in this case ("Shumate"). Reed sought consent to file this *amicus* brief from the respective counsel for John R. Patterson, Trustee ("Patterson") and Shumate. Shumate consented to the *amicus* brief but Patterson refused consent.

Reed is the debtor/appellant in *In re Reed* currently pending before the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") as Case No. 90-15874, which case involves issues similar to the issues before this Court. The pending *Reed* case includes additional

considerations which may assist the Court in determining whether the retirement benefits of a debtor in bankruptcy are protected from the creditors of the debtor's bankruptcy estate. The decision reached by this Court in this case will have a direct impact on the *Reed* case pending before the Ninth Circuit. Reed wishes to present these additional considerations to this Court by way of the accompanying proposed *amicus* brief because Reed does not believe these considerations have been or will be addressed by the parties even though they are crucial for this Court's analysis and decision.

Counsel for Reed has reviewed Patterson's Petition for Writ of Certiorari, Shumate's Brief in Opposition to Petition for Writ of Certiorari and Petitioner's Reply Brief (the "Certiorari Pleadings") and, based on a reading of these Certiorari Pleadings, believes that the following matters which are significant to this Court's analysis and decision will not be fully presented by the parties to this Court.

First, recent cases issued by the Third, Fourth, Fifth, Sixth, Eighth and Tenth Circuits have all held that a bankrupt debtor's retirement benefits are protected from creditors of the estate. The above Circuits had the benefit of recent decisions by this Court that helped clarify portions of the analysis. While the above Circuits did not follow the same analysis in reaching their results, their opinions achieved the same effect – the protection of a debtor's retirement benefits from creditors. Several of the above Circuits' cases were not discussed in the Certiorari Pleadings, yet these cases provide additional insight and analysis of the issues that will be beneficial to this Court.

Next, the parties also have not addressed the significant Congressional policy considerations behind ERISA and the Bankruptcy Code, what body should make exceptions to Congressional policy, what economic costs are involved and who ultimately must pay such economic costs.

Third, there are two steps in determining the larger question of whether retirement benefits of a debtor in bankruptcy are protected from the creditors of the debtor's bankruptcy estate. Initially, this Court should determine whether the term "applicable nonbankruptcy law" in Bankruptcy Code § 541(c)(2) encompasses ERISA § 206(d)(1). If this term does include ERISA § 206(d)(1), retirement benefits subject to ERISA are *excluded* from the debtor's bankruptcy estate and remain protected from creditors. No further analysis would be necessary for ERISA qualified retirement benefits.

If this Court determines that "applicable nonbankruptcy law" does not include ERISA § 206(d)(1), the Court should then determine whether the retirement benefits are *exempt* from creditors pursuant to Bankruptcy Code § 522(b). There are two specific subissues that must be analyzed in determining whether retirement benefits are exempt from creditors. These issues are (1) whether ERISA § 206(d)(1) is "other federal law" within the meaning of Bankruptcy Code § 522(b)(2) thereby exempting ERISA qualified plans, and (2) whether Bankruptcy Code § 522(b) elevates state exemption statutes to the status of federal law thereby saving the state statutes from ERISA preemption.

Reed's proposed *amicus* brief provides a useful and meaningful scrutiny of the issues of exclusion and exemption of a debtor's retirement benefits. Based on the above, Reed requests that this Court grant leave for Reed to file his proposed *amicus* brief for consideration by this Court.

DATED this 31st day of March, 1992.

By ____________________

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BRIEF BY *AMICUS CURIAE*, ELDON S. REED IN SUPPORT OF RESPONDENT

HISTORY AND INTEREST OF THE AMICUS CURIAE

The *amicus curiae* Eldon S. Reed filed his bankruptcy petition on May 20, 1988. He was a participant in an employer-sponsored pension plan which was qualified pursuant to ERISA and the Internal Revenue Code. In his Schedule of Assets filed with the Bankruptcy Court for the District of Arizona (the "Arizona Bankruptcy Court"), *amicus curiae* claimed an exemption pursuant to Bankruptcy Code § 522(b) and Ariz. Rev. Stat. Ann. § 33-1126 for all of his retirement benefits in the pension plan.

The bankruptcy trustee filed an objection to *amicus curiae's* claim for an exemption of his retirement benefits.

The matter was heard by the Arizona Bankruptcy Court on October 2, 1989. The Arizona Bankruptcy Court decided against the *amicus curiae* and in favor of the bankruptcy trustee shortly thereafter.

The *amicus curiae* appealed the Arizona Bankruptcy Court decision to the United States District Court for the District of Arizona (the "Arizona District Court"). The Arizona District Court affirmed the Arizona Bankruptcy Court decision and the *amicus curiae* appealed to the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit"). The Ninth Circuit affirmed the Arizona District Court and the Arizona Bankruptcy Court decisions on December 11, 1991. The *amicus curiae* then filed a Petition for Rehearing and Suggestion for Rehearing *En Banc* with the Ninth Circuit, which petition is currently pending.

The resolution of this case will have a direct impact on the *amicus curiae's* case now pending before the Ninth Circuit. Several questions of law in this case are involved in *amicus curiae's* case in the Ninth Circuit. The *amicus curiae's* case also involves additional alternative legal arguments which *amicus curiae* believes are relevant and beneficial to this Court in its resolution of the general question of whether pension benefits of a debtor in bankruptcy are protected from creditors of the debtor's bankruptcy estate.

SUMMARY OF THE ARGUMENT

This Court's analysis in *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365 (1990), and *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989), has called into question the rationale supporting *Goff v. Taylor*, 706 F.2d 574 (5th Cir. 1983), and its progeny, *In re Graham*, 726 F.2d 1268 (8th Cir. 1984), *Daniel v. Security Pac. Nat'l Bank*, 771 F.2d 1352 (9th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986), and *In re Lichstrahl*, 750 F.2d 1488 (11th Cir. 1985). *Goff* and its progeny concluded that the retirement benefits of a debtor in bankruptcy were not protected from creditors of the debtor's bankruptcy estate based upon a review of the legislative history to Bankruptcy Code §§ 522(b)(2) and 541(c)(2). The "plain meaning" rule and simple principles of statutory construction were violated by *Goff* and its progeny. Since this Court's decisions in *Guidry* and *Ron Pair*, several Circuit Courts have held that the retirement benefits of a debtor in bankruptcy are protected from creditors and have rejected the thought process of *Goff* and its progeny. Yet a split in the Circuits still remains and this Court can resolve the analysis once and for all rejecting *Goff* and its progeny.

Congress has directly, expressly and consistently protected retirement benefits by placing anti-alienation or exemption provisions in numerous statutes involving retirement benefits. Examples of statutes with anti-alienation or exemption provisions include ERISA, the Internal Revenue Code, the Bankruptcy Code, the Social Security Act, Civil Service Retirement Act and the Railroad Retirement Act. ERISA's anti-alienation provisions reflect a considered pattern of Congressional policy choices to safeguard a means of income for pensioners and their

families. If Congress had wanted to exclude any form of alienation, it could have done so expressly just as it did with qualified domestic relations orders.

Following this Court's "plain meaning" rule for statutory construction in *Ron Pair*, "applicable nonbankruptcy law" in Bankruptcy Code § 541(c)(2) must be read to include ERISA's anti-alienation provision. Consequently, ERISA qualified retirement benefits are excluded from a debtor's bankruptcy estate.

In addition, this Court's logic in *Ron Pair* and *Guidry* dictates that ERISA § 206(d)(1) is "other federal law" within the meaning of Bankruptcy Code § 522(b)(2), thereby exempting ERISA qualified retirement benefits of a debtor from the creditors of the debtor's bankruptcy estate.

Considering this Court's findings in *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983), and Congress' desire to work with the states in creating exemptions for debtors that allow debtors to emerge from bankruptcy with sufficient possessions for a fresh start, state exemption statutes protecting retirement benefits are saved from ERISA preemption by Bankruptcy Code § 522(b) and ERISA § 514(d).

ARGUMENT

I. SEVERAL RECENT DECISIONS BY THIS COURT AND VARIOUS CIRCUITS HAVE UNDERMINED THE VIABILITY OF *GOFF* AND ITS PROGENY

This Court's analysis in *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365 (1990) (hereinafter "*Guidry*"), and *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989) (hereinafter "*Ron Pair*"), has called into question the rationale supporting *Goff v. Taylor*, 706 F.2d 574 (5th Cir. 1983) (hereinafter "*Goff*"), *In re Graham*, 726 F.2d 1268 (8th Cir. 1984) (hereinafter "*Graham*"), *Daniel v. Security Pac. Nat'l Bank*, 771 F.2d 1352 (9th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986) (hereinafter "*Daniel*"), and *In re Lichstrahl*, 750 F.2d 1488 (11th Cir. 1985) (hereinafter "*Lichstrahl*") (all four cases hereinafter referred to as "*Goff* and its progeny").

Goff and its progeny concluded that a review of the legislative history to Bankruptcy Code § 541 was necessary to determine whether "applicable nonbankruptcy law" referred only to state law or to both state and federal law. In interpreting the legislative history, these courts concluded that because the legislative history to Bankruptcy Code § 541 mentioned only state spendthrift trust law, "applicable nonbankruptcy law" must include *only* state spendthrift trust law.

They also looked to the legislative history of Bankruptcy Code § 522 to determine whether ERISA is "other federal law." The legislative history to Bankruptcy Code § 522 contains an illustrative list of examples of "other federal law" but ERISA is not included in the list. While the list is only illustrative, the courts still concluded that

Congress must not have intended ERISA to be "other federal law" for purposes of Bankruptcy Code § 522.

This Court in *Ron Pair* clarified a court's role in statutory construction by developing the "plain meaning" rule. The plain meaning rule provides that if a statute is clear on its face, the analysis stops at the clear meaning of the statute. *Ron Pair* and the plain meaning rule are in direct conflict with the statutory construction undertaken by *Goff* and its progeny.

This Court in *Guidry* also made it clear that ERISA provisions are superior to creditors' rights, and that the ERISA anti-alienation provision is comparable to other federal anti-alienation provisions in the illustrative list included as a part of the legislative history to Bankruptcy Code § 522(b). *Goff* and its progeny again run contrary to this Court's rulings.

Since this Court issued its decisions in *Ron Pair* and *Guidry,* the overwhelming majority of circuits to address the question currently before this Court have held that retirement benefits of a debtor in bankruptcy are protected from the creditors of the debtor's bankruptcy estate. The Third, Fourth, Sixth and Tenth Circuits have issued decisions directly in conflict with *Goff* and its progeny. The four Circuits addressed the meaning of "applicable nonbankruptcy law," discarded the *Goff* rationale in favor of this Court's plain meaning rule found in *Ron Pair,* and held that ERISA is "applicable nonbankruptcy law." *Velis v. Kardanis,* 949 F.2d 78 (3rd Cir. 1991) (hereinafter "*Velis*"); *In re Moore,* 907 F.2d 1476 (4th Cir. 1990) (hereinafter "*Moore*"); *In re Lucas,* 924 F.2d 597 (6th Cir. 1991), *cert. denied, Forbes v. Holiday Corp. Sav. and*

Retirement Plan, 111 S. Ct. 2275 (1991) (hereinafter "*Lucas*"); *In re Harline,* 950 F.2d 669 (10th Cir. 1991), *petition for cert. filed,* ___ U.S.L.W. ___ (U.S. March 4, 1992) (No. 91-1412) (hereinafter "*Harline*").

The Fifth Circuit, which originally issued the *Goff* decision, and the Eighth Circuit, which originally issued the *Graham* decision, recently issued decisions protecting bankrupt debtors' retirement benefits from creditors. *In re Volpe,* 943 F.2d 1451 (5th Cir. 1991); *In re Dyke,* 943 F.2d 1435 (5th Cir. 1991); *In re Vickers,* ___ F. 2d ___, 60 U.S.L.W. 2487 (8th Cir. Jan. 24, 1992). The new decisions hold that ERISA does not preempt state exemption statutes.

The clear trend of the Circuits has been to protect retirement benefits from creditors. One exception has been the Ninth Circuit where the *amicus curiae* resides and which recently affirmed its original *Daniel* decision in *Pitrat v. Garlikov,* 947 F.2d 419 (9th Cir. 1991), and *In re Reed,* 951 F.2d 1046 (9th Cir. 1991). Both debtors have filed Petitions for Rehearing and Suggestion for Rehearing *En Banc* and both cases are currently pending before that Circuit.

The recent trend of cases in the Circuits clearly shows the effort by courts to harmonize federal bankruptcy law with ERISA and the Internal Revenue Code. Judge Fletcher from the Ninth Circuit in a concurring opinion acknowledged that the Ninth Circuit's decisions in this area do not harmonize federal bankruptcy law and ERISA law and undercut the purposes of ERISA. *In re Kincaid,* 917 F.2d 1162, 1170 (9th Cir. 1990) (*Fletcher,* concurring).

In light of the recent decisions by this Court, as well as the recent well-reasoned decisions by the Third,

Fourth, Fifth, Sixth, Eighth and Tenth Circuits, this Court should reject *Goff* and its progeny and rule that the retirement benefits of a debtor in bankruptcy are protected from creditors just as those same benefits would be protected if the debtor had not filed bankruptcy.

II. CONGRESSIONAL POLICY CONSIDERATIONS DICTATE PROTECTION OF RETIREMENT BENEFITS

Three separate statutes enacted by Congress generally address the issue of retirement benefit protection, the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), the Internal Revenue Code ("IRC"), and the Bankruptcy Code ("Bankruptcy Code"). Each of these statutes clearly provides protection for retirement benefits from creditors' claims. ERISA § 206(d); IRC § 401(a); Bankruptcy Code § 522. The *amicus curiae* is unaware of any statutes enacted by Congress which specifically allow creditors to pursue retirement benefits. In fact, in every situation when a statute has been enacted by Congress dealing with retirement benefits, Congress also included an anti-alienation or protection clause to preclude collection from retirement benefits. *See Social Security Act*, 42 U.S.C. § 407; *Civil Service Retirement Act*, 5 U.S.C. § 8346(a); *Railroad Retirement Act*, 45 U.S.C. § 231m(a).

The majority of state legislatures also have drafted exemption statutes for their states. With Congress and the majority of state legislatures providing pension plan protection in several different statutes, one can only conclude that Congress and the states have a serious interest in protecting retirement benefits for their intended use – income for retired individuals.

It is not surprising that Congress and the states wish to protect retirement income. The cost to support individuals during their retirement years is enormous. According to information provided by the Employee Benefit Research Institute, qualified retirement plans in America held approximately $2.329 trillion in assets in 1988. Of this amount, $1.504 trillion was held in private plans while $825 billion was held in federal, state and local retirement plans. Contributions to qualified retirement plans in 1988 exceeded $183 billion while benefit payments from these plans equaled approximately $196 billion. These numbers continue to grow each year. For 1990, individuals contributed $267.5 billion into the social security trust fund and benefit payments from the social security trust fund equaled $223 billion.[1] Approximately twenty-eight percent (28%) of the federal government's expenditures in 1991 constituted benefits for retirees.[2]

With such a large number of dollars sitting in pension plans, creditors have become creative in an attempt to break down the protections provided by Congress.

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[1] The above statistics are from the EBRI Databook on Employee Benefits, second edition, Joseph S. Piacentini and Jill Foley, eds. (Washington D.C., forthcoming).

[2] U.S. Budget, Director's Introduction (and overview tables) Part One-25.

However, the decisions of courts that have allowed creditors in bankruptcy access to retirement benefits have given creditors an unexpected windfall.

Pursuant to ERISA, qualified pension plan benefits are supposed to be protected from the beneficiary's creditors. Thus, creditors historically have not taken the individual's assets in a qualified retirement plan into account when assessing the credit risk and deciding to issue credit. In essence, under *Goff* and its progeny, creditors now will receive payment from a source they otherwise were not supposed to be entitled to and from a source they did not expect to be available when they originally assessed the risk of extending credit. As a result, the risk of extending credit has shifted from the creditor, who already calculated the cost of the risk into the credit price, to someone not prepared to pay for the cost from retirement funds. The individual who lost the anticipated retirement money must begin to save again or, more than likely, the cost will shift to the general public who must fund greater governmental expenditures to help support these individuals through their retirement years.

Creditors have been successful in confusing an otherwise clear area of the law through the use of unorthodox and ill-founded reasoning. In effect, these individuals argue that while each of the various statutes applicable to the issue provides for protection of retirement benefits from creditors, taken together these statutes create a domino effect and cancel each other out. Their argument, reduced to an equation, is that one exemption in ERISA plus one exemption in the IRC plus one exemption in the

Bankruptcy Code plus one exemption in a state statute actually equals no exemption, or better stated:

$$1 + 1 + 1 + 1 = 0.$$

They support this result by ignoring the plain and simple language of the various statutes involved and looking directly to the legislative history of these statutes. Then they take simple examples in the legislative history and turn them into absolutes. This is an anomaly which Congress did not intend to create. The intent of Congress, as clearly expressed in any statute it created relating to retirement benefits, has been to provide protection for a debtor's retirement benefits. Creditors say this result is unfair and inequitable because it allows a debtor to retain a pool of money while at the same time receiving a forgiveness of a debt.

This Court in *Guidry* stated that it is inappropriate to approve any generalized equitable exception to ERISA's prohibition on the assignment or alienation of pension benefits:

> Section 206(d) reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them. If exceptions to this policy are to be made, it is for Congress to undertake that task.

493 U.S. at 376. This Court went on to explain how Congress did amend the anti-alienation provision in ERISA in 1984 to exclude qualified domestic relations orders in § 104(a) of the *Retirement Equity Act of 1984*. *Id.*

at 376 n. 18. If Congress had wanted to exclude any other form of alienation it could have done so at that time.

This Court cautioned that, as a general matter:

> [C]ourts should be loath to announce equitable exceptions to legislative requirements to prohibitions that are unqualified by the statutory text. The creation of such exceptions, in our view, would be especially problematic in the context of an antigarnishment provision. Such a provision acts, by definition, to hinder the collection of a lawful debt. A restriction on garnishment therefore can be defended *only* in the view that the effectuation of certain broad social policies sometimes takes precedence over the desire to do equity between particular parties. It makes little sense to adopt such a policy and then to refuse enforcement whenever enforcement appears inequitable.

Id. at 376-77 (emphasis in original).

What some creditors have tried to accomplish with their strained analysis of the legislative history to Bankruptcy Code §§ 522(b) and 541(c) is an equitable exception to the anti-alienation provision in ERISA. However, "it is up to Congress to amend ERISA, not the courts. If creditors and courts find it objectionable to permit persons . . . to shelter large sums of money in ERISA tax-qualified plans, their appeal should be to Congress." *In re Komet*, 104 B.R. 799, 816 (Bankr. W.D. Tex. 1989). And, while "there may be a natural distaste for the result . . . [t]he statute, however, is clear." *Guidry*, 493 U.S. at 377.

III. A BANKRUPT DEBTOR'S RETIREMENT BENEFITS ARE EXCLUDABLE OR EXEMPT

A simple two-step analysis of the issues affecting retirement benefits of debtors in bankruptcy should be used by this Court. First, this Court should determine whether the term "applicable nonbankruptcy law" found in Bankruptcy Code § 541(c)(2) encompasses ERISA § 206(d)(1). If this term does include ERISA § 206(d)(1), then retirement benefits subject to ERISA are *excluded* from the debtor's bankruptcy estate and remain protected from creditors. No further analysis is necessary for ERISA qualified retirement benefits.

Second, if this Court decides that "applicable nonbankruptcy law" does not include ERISA § 206(d)(1), then this Court should determine whether the retirement benefits that are included in a debtor's bankruptcy estate are *exempt* from creditors pursuant to Bankruptcy Code § 522. The two specific issues to analyze in this step are, first, whether ERISA § 206(d)(1) is "other federal law" within the meaning of Bankruptcy Code § 522(b), and second, whether Bankruptcy Code § 522(b) and ERISA § 514(d) save state exemption statutes from preemption by ERISA. The Court should conclude under either analysis that retirement benefits are protected.

A. A Debtor's Retirement Benefits are *Excludable* From the Bankruptcy Estate Pursuant to Bankruptcy Code § 541(c)(2) Because "Applicable Nonbankruptcy Law" Encompasses ERISA § 206(d)(1).

In the wake of this Court's decision in *Ron Pair,* a plethora of Courts have critically examined the precedent of *Goff* and its progeny on the question of whether "applicable nonbankruptcy law" found in Bankruptcy Code § 541(c)(2) is a narrow reference to state spendthrift trust law or is broad enough to encompass ERISA's anti-alienation provisions. Included amongst these courts are the Third Circuit in *Velis,* the Fourth Circuit in *Moore,* the Sixth Circuit in *Lucas,* and the Tenth Circuit in *Harline.* These courts, as well as several lower courts, have held that "applicable nonbankruptcy law" is not limited to state spendthrift trust law but also includes ERISA's anti-alienation provision found in ERISA § 206(d)(1).

Unlike *Goff* and its progeny, these courts had the benefit of many well-reasoned recent cases by this Court which have held that the plain meaning of a statute controls. *See Toibb v. Radloff,* 111 S. Ct. 2197, 2200 (1991) (hereinafter "*Toibb*"); *Ron Pair,* 489 U.S. at 242; *Davis v. Michigan Dep't of Treasury,* 489 U.S. 803, 808 n. 3 (1989) (hereinafter "*Davis*"); *Burlington Northern R. R. v. Oklahoma Tax Comm'n,* 481 U.S. 454, 461 (1987) (hereinafter "*Burlington*").

The Third, Fourth, Sixth and Tenth Circuits hold that an appeal to the legislative history of Bankruptcy Code § 541(c)(2) is inappropriate because the language of the statute is clear. Legislative history is irrelevant to the interpretation of an unambiguous statute.

The Fourth Circuit in *Moore* pointed out that the term "applicable nonbankruptcy law" is used throughout the Bankruptcy Code and, in places other than Bankruptcy Code § 541(c), the term includes federal law as well as state law. The Fourth Circuit in *Moore* stated:

> It is incongruous to give the same phrase in § 541(c)(2) a narrower construction than the identical phrase in other parts of the Bankruptcy Code, particularly since the disparate sections of the Bankruptcy Code were enacted together in a single comprehensive statute.

907 F.2d at 1477.

If Congress really wanted Bankruptcy Code § 541(c)(2) to apply only to state spendthrift trust law, the term "state spendthrift trust law" could easily have been used in the statute rather than the term "applicable nonbankruptcy law." The term "applicable nonbankruptcy law" suggests no limitation to state spendthrift trust law and this Court, just like the Third, Fourth, Sixth and Tenth Circuits, should refuse to read such a limitation into the statute.

These four Circuits also hold that, even if the legislative history of Bankruptcy Code § 541(c)(2) were relevant, it would be inconclusive. At most, the legislative history suggests that Congress wanted to include state spendthrift trust law within the meaning of "applicable nonbankruptcy law." This Court stated in *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1980) ("*GTE Sylvania*"), that "[a]bsent a clearly expressed

legislative intention to the contrary, th[e] language must ordinarily be regarded as conclusive." *See also Toibb,* 111 S. Ct. at 2200 (quoting *GTE Sylvania*).

In light of this Court's plain meaning rule for statutory construction, and the decisions of the Third, Fourth, Sixth and Tenth Circuits, this Court should interpret Bankruptcy Code § 541(c)(2) according to its unambiguous terms and hold that a debtor's retirement benefits are excluded from the debtor's bankruptcy estate and, therefore, the retirement benefits remain protected from creditors.

B. A Debtor's Retirement Benefits are *Exempt* from Creditors Pursuant to Bankruptcy Code § 522(b)(2).

There are two specific issues to analyze under this step. These issues are (1) whether ERISA § 206(d)(1) is "other federal law" within the meaning of Bankruptcy Code § 522(b)(2) thereby exempting ERISA qualified retirement benefits, and (2) whether state exemption statutes protecting retirement benefits are preempted by ERISA § 514(a) or does Bankruptcy Code § 522(b) elevate state exemption statutes to the status of federal law thereby saving these state statutes from preemption through ERISA § 514(d).

1. ERISA § 206(d)(1) is "other federal law" within the meaning of Bankruptcy Code § 522(b)(2).

Goff and its progeny determined that ERISA § 206(d)(1) was not "other federal law" under Bankruptcy Code § 522(b)(2) because ERISA was not included on an illustrative list of "other federal law" included in the legislative history to Bankruptcy Code § 522(b)(2). These courts failed to look at the plain meaning of the statute and instead went to the legislative history.

The task of resolving the dispute over the meaning of Bankruptcy Code § 522(b)(2)(A) must begin where this Court has stated all such inquiries must begin – with the language of the statute itself. *Ron Pair,* 489 U.S. at 241. This statute states that "any property that is exempt under federal law, other than subsection (d) of this section" is exempt from creditors of the bankruptcy estate. The statute clearly provides an exemption to any property exempt under federal law with one exception – Bankruptcy Code § 522(d). Congress provided for no other exceptions or limitations. Therefore, if any federal law other than Bankruptcy Code § 522(d) provides an exemption to property, that property remains exempt from creditors of the bankruptcy estate. The statute is clear and unambiguous on its face so "the inquiry should end, for where, as here, the statute's language is plain, the sole function of the courts is to enforce it according to its terms." *Id.* Reference to legislative history is not necessary. *See In re Starkey,* 116 B.R. 259 (Bankr. D. Colo. 1990) (hereinafter "*Starkey*"); *In re Burns,* 108 B.R. 308 (Bankr. W.D. Okla. 1989) (hereinafter "*Burns*"); *In re Komet,* 104 B.R. 799 (Bankr. W.D. Tex. 1989) (hereinafter "*Komet*"). For additional authority regarding the plain meaning rule and the use of legislative authority, refer to the analysis in the prior section citing *Toibb, Davis, Burlington, Velis, Moore, Lucas* and *Harline.*

Even if this Court were to look at the legislative history to Bankruptcy Code § 522(b)(2) in deciding this issue, the failure to include an item in an illustrative list is not probative. If resort is to be made to the legislative history, then the interpretation of that history must be disciplined. As stated by the *Komet* court:

> It is a non-sequitur to say that the *failure* to *include* something on an *illustrative* list is probative of an intent to exclude it from that list. Illustrative lists (in contrast to exhaustive lists) by their nature preclude the possibility of "overlooking" a statute of the type already listed.

104 B.R. at 815 (emphasis in original).

Goff and its progeny have gone to extraordinary lengths to explain why ERISA is not included in the illustrative list. A favorite argument of *Goff* and its progeny is that because Congress listed significantly less comprehensive and less well known statutes but excluded the better known ERISA statute, Congress must have intended to exclude the ERISA statute. The argument misses the point that an illustrative list is simply that – illustrative and not exhaustive. Their arguments do not consider the origination of the illustrative list which came from the old Bankruptcy Act and was created prior to the enactment of ERISA. Two of the statutes included in the legislative history had been repealed prior to it being copied from the Bankruptcy Act's legislative history to the Bankruptcy Code's legislative history and in the case of two other statutes, the citations given were not that of the specified provisions. *Burns*, 108 B.R. at 315.

They also fail to consider this Court's finding in *Guidry* that the anti-alienation and assignment provision

in ERISA is comparable to those in the Social Security Act, the Railroad Retirement Act, the Civil Service Retirement Act and the Veteran's Benefits Act. *Guidry*, 493 U.S. at 372 n. 13. All of these acts are listed on the illustrative list in the legislative history to Bankruptcy Code § 522(b)(2) and each of these acts covers retirement benefits that are not covered under ERISA and therefore in need of their own anti-alienation provisions.

The reasoning of *Goff* and its progeny is faulty and inconsistent with this Court's reasoning. These cases fail to follow the plain meaning rule for statutory construction and make undisciplined interpretations of the legislative history. Bankruptcy Code § 522(b)(2) is clear on its face and provides that ERISA qualified retirement benefits are exempt from creditors.

2. ERISA § 514(a) does not preempt a state exemption statute protecting retirement benefits because of Bankruptcy Code § 522(b) and ERISA § 514(d).

ERISA § 514(a) provides that ERISA provisions supercede state laws insofar as they relate to any employee benefit plan covered by ERISA. This Court has adopted a broad construction of this preemption clause concluding that ERISA § 514(a) is expansive, not restrictive, and that a state law relates to an employee benefit plan if it has a connection with or reference to such a plan. *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478 (1990) (hereinafter "*Ingersoll-Rand*"); *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988) (hereinafter

"Mackey"); *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983) (hereinafter *"Shaw"*).

While ERISA § 514(a) provides for expansive preemption, there are several other provisions in ERISA § 514 that provide exceptions to this general expansive preemption power. These additional provisions are referred to as savings clauses because they expressly save certain statutes from ERISA preemption. The applicable savings clause for this analysis is ERISA § 514(d) which provides that the terms of ERISA shall not "be construed to alter, amend, modify, invalidate, impair or supercede" any federal laws.

The Bankruptcy Code is an example of federal law that is not preempted by ERISA because of ERISA § 514(d). Congress, in drafting the Bankruptcy Code, relied upon the states to assist it in accomplishing its goals. In particular, Congress relied on the states to set appropriate exemption levels, considering the circumstances in their states, to ensure that a debtor comes out of bankruptcy with sufficient possessions for a fresh start.

Bankruptcy Code § 522(b) provides two alternative types of exemption schemes for debtors in bankruptcy. One alternative is the generic federal exemptions found in Bankruptcy Code § 522(d), used by debtors in states that fail to create their own exemptions and never opt out of this alternative. The second alternative type of exemptions are any exemptions provided under federal law, other than in Bankruptcy Code § 522(d), and any exemptions provided by state law. A large number of states have elected to opt out of the generic federal exemptions alternative and create their own exemptions. Once a state

elects to opt out of the generic federal exemptions, debtors in that state no longer have the generic federal exemptions available to them.

The authority of states to opt out of the generic federal exemptions and create state exemptions is not derived from the state exemption statutes themselves, but from Bankruptcy Code § 522(b). Without Bankruptcy Code § 522(b), these state exemption statutes would be meaningless to debtors in bankruptcy and would be preempted by the Bankruptcy Code itself.

The issue then is whether state exemption statues authorized by Bankruptcy Code § 522(b) and created to assist in the enforcement of federal bankruptcy goals are protected from preemption by Bankruptcy Code § 522(b).

This Court conducted a similar analysis in *Shaw* and concluded that under certain circumstances ERISA § 514(a) does not preempt state laws authorized by federal statute.

The *Shaw* matter involved three statutes, Title VII of the Civil Rights Act of 1968, 42 U.S.C. § 2000(e) *et seq.* ("Title VII"), the New York Human Rights Law which prohibits discrimination in employment disability benefits between pregnant and non-pregnant disabled employees ("New York Statute") and ERISA. Title VII, in part, prohibits discrimination based on pregnancy and allows states to pass statutes that are more restrictive than the requirements of Title VII. The New York Statute was more restrictive than Title VII and involved disability plans covered by ERISA. Several employers sought a declaratory judgment of preemption of the New York Statute by ERISA. New York State argued that the New

York Statute was protected from preemption by ERISA because Title VII allowed these types of state laws and ERISA § 514(d) states that ERISA shall not be construed to "alter, amend, modify, invalidate, impair or supercede any law of the United States . . . or any rule or regulation issued under any such laws."

This Court first stated in *Shaw* that ERISA did not preempt entirely the New York Statute given its importance to the federal enforcement scheme of Title VII. Such a preemption would impair Title VII. *Shaw*, 463 U.S. at 102. This Court said:

> If ERISA were interpreted to preempt the Human Rights Law entirely with respect to covered benefit plans, the State no longer could prohibit the challenged employment practice and the state agency no longer would be authorized to grant relief. The EEOC thus would be unable to refer the claim to the state agency. This would frustrate the goal of encouraging joint state/federal enforcement of Title VII; an employee's only remedies for discrimination prohibited by Title VII in ERISA plans would be federal ones. Such a disruption of the enforcement scheme contemplated by Title VII would, in the words of § 514(d), "modify" and "impair" federal law.

Id. Clearly, this Court recognizes that when Congress desires joint state and federal participation in a federal statute, the state participation is elevated to the level of the federal statute and protected from preemption as long as the invalidation of the state statute would "alter, amend, modify, invalidate, impair, or supercede" the authorizing federal statute.

This Court went on to say in *Shaw*:

> Insofar as state laws prohibit employment practices that are lawful under Title VII, however, pre-emption would not impair Title VII within the meaning of § 514(d). Although Title VII does not itself prevent States from extending their nondiscrimination laws to areas not covered by Title VII, . . . it in no way depends on such extensions for its enforcement. Title VII would prohibit precisely the same employment practices, and be enforced in precisely the same manner, even if no state made additional employment practices unlawful. Quite simply, Title VII is neutral on the subject of all employment practices it does not prohibit. We fail to see how federal law would be impaired by preemption of a state law prohibiting conduct that federal law permitted.

Id. at 103-104. This Court provided that when a federal statute allows states to create law that is more restrictive than the federal statute, the federal statute is not impaired by the invalidation of such a state law. Thus in *Shaw*, the New York statute was preempted in part and saved in part under ERISA. The enforcement part of the New York Statute was saved because it was an integral part of Title VII and its invalidation would impair Title VII. The more restrictive prohibitions against discrimination contained in the New York Statute were preempted by ERISA because the invalidation of these restrictions did not impair the discrimination prohibitions in Title VII.

Just as the enforcement provisions of the New York Statute are an integral part of Title VII, so are state

exemption statutes an integral part of the Bankruptcy Code. Unlike the discrimination provisions of the New York Statute, if a state exemption statute is invalidated, the effect is to impair Bankruptcy Code § 522. The discrimination provisions of the New York Statute are *in addition to* the provisions of Title VII. A state exemption statute is an *alternative to* Bankruptcy Code § 522(d).

These state exemption statutes help implement important federal bankruptcy goals such as a debtor's fresh start. If ERISA is allowed to preempt state exemption statutes protecting retirement benefits, those states who have opted out of the generic federal exemptions to participate with Congress in achieving its bankruptcy goals will be unable to provide any protection to their citizens' retirement benefits. This result is contrary to Congress' desire to protect retirement benefits and impairs Bankruptcy Code § 522(b). Congress determined that the Bankruptcy Code is paramount to ERISA and the same is true for state laws enacted pursuant to specific authority of the Bankruptcy Code. *In re Vickers,* 116 B.R. 149 (Bankr. W.D. Mo. 1990), *aff'd,* 126 B.R. 348 (Bankr. W.D. Mo. 1990), *aff'd,* ___ F.2d ___, 60 U.S.L.W. 2487 (8th Cir. Jan. 24, 1992). *See also In re Dyke,* 943 F.2d 1435 (5th Cir. 1991) (ERISA § 522(b) does not preempt a state exemption statute because of Bankruptcy Code § 522(b) and ERISA § 514(d)).

CONCLUSION

In light of this Court's decision in *Ron Pair, Guidry, Toibb, Davis, Shaw* and *Burlington,* the Third Circuit decision of *Velis,* the Fourth Circuit decision of *Moore,* the Fifth Circuit decisions of *Volpe* and *Dyke,* the Sixth Circuit decision of *Lucas,* the Eighth Circuit decision of *Vickers,* the Tenth Circuit decision of *Harline,* the plain meaning of Bankruptcy Code §§ 522(b)(2) and 541(c)(2) and the clear Congressional policy considerations involved, this Court should determine (1) that ERISA qualified retirement benefits of a debtor in bankruptcy are excluded from the debtor's bankruptcy estate pursuant to Bankruptcy Code § 541(c)(2), (2) that ERISA § 206(d)(1) is "other federal law" within the meaning of Bankruptcy Code § 522(b)(2) thereby exempting ERISA qualified retirement benefits, and (3) that state exemption statutes protecting retirement benefits are saved from ERISA preemption by Bankruptcy Code § 522(b). Such a ruling will ensure the continued protection of retirement benefits of a debtor sought by Congress even if that debtor were forced to file bankruptcy.

Respectfully submitted,

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